No. 95-1229

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

STEVE KNIGHT, JR., d/b/a STEVE KNIGHT, STEEL FABRICATORS AND STEVE MARK KNIGHT, AS THE ADMINISTRATOR OF THE ESTATE OF WILLIE STEVE KNIGHT, JR.,

Petitioners,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an insurance company acted reasonably in withdrawing a defense for its insured when it was clear that the vehicle involved in the underlying accident was not covered under any of the insured's policies.

2. Whether this Court should disturb the Court of Appeals' affirmance of the District Court's grant of summary judgment to an insurance company on an insured's claims for punitive and extracontractual damages when both lower courts found as a matter of law that the insurer had not only an "arguable reason" to deny the claim, but also that there was no duty to defend.

LIST OF PARTIES

Steve Knight	Plaintiff/Appellant Plaintiff/Appellant #94-60861* Plaintiff/Appellee #95-00029
William L. Denton	Attorney for Knight
Joseph H. Montgomery	Attorney for Knight
Bragg E. Williams, III	Attorney for Knight
Rev. William Buice	Plaintiff/Appellant #94-60384
Logan & Bise	Attorneys for Buice #94-60384
John Genin	Attorneys for Buice #94-60384
United States Fidelity and Guaranty Company	Defendant/Appellee Garnishee Defendant/Appellee #94-60384 Defendant/Appellee #94-60861
Brown, Watt & Buchanan, P.A.	Attorneys for U.S.F. & G.
Chicago Insurance Company	Garnishee Defendant/Appellee #94-60384 Defendant/Appellant #95-00029
Butler, Snow, O'Mara, Stevens & Cannada	Attorneys For Chicago Insurance Company

Pursuant to Supreme Court Rule 29(6), United States Fidelity and Guaranty Company's parent company is United States Fidelity and Guaranty Corporation and its non-wholly owned subsidiaries are as follows:

1. Ballston U.S.F. & G. Holding Company, Inc.; and

2. TNP Office, Inc.

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* Denotes United States Court of Appeals For The Fifth Circuit docket number.

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OPINIONS BELOW

Petitioner, Steve Knight, Jr., d/b/a Steve Knight Steel Fabricators and Steve Mark Knight as the Administrator of the Estate of Willie Steve Knight, Jr. (hereinafter "Knight"), brought the present bad faith suit in the United States District Court for the Southern District of Mississippi under 28 U.S.C. § 1332. On November 30, 1994, the District Court granted Respondent, United States Fidelity and Guaranty Company (hereinafter "U.S.F. & G."), summary judgment based upon Mississippi insurance law.

The United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming the District Court's ruling. Knight moved for a rehearing of this judgment which was denied on November 2, 1995. Knight has sought review of the Fifth Circuit's judgment under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On or about August 1, 1991, Knight filed the present bad faith action against his primary carrier, U.S.F. & G., and Chicago Insurance Company (hereinafter "Chicago"), his excess carrier, for tortious breach of contract and bad faith breach of duty to defend. (R. 1-6.) Knight sought punitive damages for U.S.F. & G.'s alleged failure to defend Knight in the underlying wrongful death action filed by the Estate of Mary Virginia Buice. The *Buice* complaint alleged that Gary Brock, an employee of Knight, pursuant to the course and scope of his employment by Knight, struck and killed Ms. Buice on July 6, 1984.

U.S.F. & G. issued five policies to Knight's business, three of which were in force during November 11, 1983, to November 10, 1984: a business auto policy, No. BAP1401146688; a trucker's policy, No. 026084300; and a general liability policy,

No. 025165294. (R. 830.) Burt Young, of the Crystal Springs Insurance Agency, an authorized U.S.F. & G. agency, was the agent that sold, collected the premiums, and received a commission on all of the business insurance policies of Knight's business. (R. 830.)

On the night of the accident, Brock was driving his own personal pickup truck. Brock had purchased the pickup truck from Knight about two months prior to the accident. (R. 871.) Knight had transferred title of the pickup to Brock to enable Brock to obtain financing on the vehicle. (R. 871-72.) The truck was removed by endorsements from Knight's business auto policy on June 1, 1984, over a month before the accident. (R. 872.) Brock had obtained his own liability insurance policy on the pickup with Reliance Insurance. The policy limits on the Reliance coverage were subsequently paid to the Buice estate. (R. 872.)

On the day of the accident, Brock had worked at Knight's gravel pit in Nicholson, Mississippi. (R. 833.) That evening, Brock went over to Port Bienville in Pearlington, Mississippi, to collect his pay. (R. 833.) Upon arrival in Pearlington, Brock took a shower, cleaned up, and changed clothes. It was here at Knight's operation in Pearlington that Brock was able to use the services of a trailer on the premises which contained living accommodations and a kitchen, complete with a table and groceries. Brock was living at this trailer at the time of the accident.

After having been paid, and following a change of clothes and cleaning up, Brock decided to go to Slidell, Louisiana. (R. 834.) Brock then went by a friend's house to see her. Brock proceeded to a restaurant to eat dinner and drink beer. (R. 834.) After eating, Brock stopped at a Time-Saver convenience store, purchased some more beer, and then headed back to Mississippi.

(R. 834.) Subsequently, Brock crossed the center line on Highway 90 and collided with Ms. Buice's vehicle, resulting in her death. (R. 834.)

The accident occurred late Friday night on July 6, 1984, when Brock, driving his own personal pickup, and driving while intoxicated, drove down the wrong side of Highway 90 and struck Ms. Buice's vehicle, causing her death.

The Buice estate initially filed a complaint against Steve Knight, Jr. Steel Fabricators, Inc. and Time-Saver Stores, Inc. on August 17, 1987, alleging that Knight was liable for the actions of Brock and that Brock was acting in the course and scope of his employment at the time of the accident. (R. 867.) The complaint alleged that Brock was intoxicated or under the influence of alcohol at the time of the accident and that Brock's negligence was the cause of Buice's death. (R. 867.) The Buice estate was allowed to file an amended complaint by order dated December 8, 1988. (R. 867.) An amended complaint was filed on December 27, 1988, adding Knight individually, d/b/a Steve Knight, Jr. Steel Fabricators, Inc., as Defendant. (R. 867.)

Floyd Logan, counsel for the Buice estate, sent a copy of the complaint in the Buice action to Burt Young, local agent for U.S.F. & G., who forwarded a copy of the complaint to U.S.F. & G. on or about April 27, 1988. (R. 868.) U.S.F. & G. began investigating the claim and retained long-time insurance defense attorney Stanford Morse in August of 1988, as counsel to defend Knight. (R. 868.) Morse filed an answer on behalf of Knight on August 12, 1988, admitting Brock's negligence but denying that he was acting in the scope of employment at the time of the accident. (R. 868.)

Regarding coverage by U.S.F. & G., the business auto policy issued to Knight contained an endorsement JXN154-B, which provided that:

> It is agreed that the unqualified word "insured" wherever it is used in Part IV - Liability Insurance includes only you and any organization legally responsible for the use of your automobile, provided the actual use of the automobile is by you or with your permission.
>
> Exceptions: The foregoing limitation does not apply with respect to private passenger automobiles, or to operation of other automobiles while being used *solely for business purposes in connection with your business*. (Emphasis added).

(R. 850.) The above restrictive non-owned vehicle endorsement would have provided coverage only if Brock's vehicle was being used "solely" for the business purposes of Knight at the time of the accident.

U.S.F. & G.'s claims personnel continued their investigation of the claim in light of the various policies issued to Knight. Forrest Holder, Sr., former claims office supervisor for U.S.F. & G., testified at the subsequent garnishment trial[1] that he received notice of the Buice accident in 1988 and determined that no coverage was afforded the Brock vehicle under any of the policies in effect at the time. (R. 839.) Holder stated that the Brock vehicle was not listed on the trucker's policy, or the

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1. The Estate of Mary Virginia Buice obtained a default judgment against Knight for the sum of $1,173,591.00. The Buice Estate then instituted garnishment proceedings against U.S.F. & G. and Chicago based upon the policies of insurance issued to Knight. After a two day trial, the District Court released U.S.F. & G. and Chicago from the garnishment action after finding no coverage under the policies. The garnishment action is presently on appeal to the U. S. Court of Appeals for the Fifth Circuit, Case No. 94-60384.

business auto policy. (R. 839.) He stated that the comprehensive general liability policy did not extend coverage to automobiles. Holder opined that the business auto policy's restrictive non-owned vehicle endorsement (JXN154-B) did not provide coverage because the vehicle was not being used solely for business purposes at the time of the accident. (R. 839.)

Darwin Ezell, a claims adjuster with twenty-seven years of experience at U.S.F. & G., stated that it was his determination that there was no coverage under the policies. (R. 840.) With respect to the information U.S.F. & G. possessed relative to the facts of the accident, Ezell stated that U.S.F. & G. had a copy of the investigating officer's report, of Brock's insurance policy, had knowledge of the facts of Brock's previous manslaughter case arising out of the same accident, along with copies of the three relevant policies issued to Knight at the time U.S.F. & G. determined that there was no coverage. (R. 840.)

Morse met with Knight and informed him that the insurance policies provided no coverage for the incident and told Knight that he would have to retain his own attorney. (R. 868.) Morse also sent a letter to Knight, dated September 21, 1988, advising him that U.S.F. & G. "does not insure the above referenced claim" and informed Knight that a motion to withdraw would be filed, and that Knight should file any written objections to the motion to withdraw with the United States District Court Clerk. (R. 868.) Morse filed his motion to withdraw as counsel for Knight on September 22, 1988. (R. 868.) The motion stated that after Morse appeared to afford Knight a defense, U.S.F. & G. determined that the business auto policy and trucker's policy provided no coverage on the vehicle involved in the accident. (R 868). Morse was allowed to withdraw as attorney of record for Knight on January 23, 1989.

Knight testified at the garnishment trial that he spoke to

attorney Joe Montgomery about the *Buice* lawsuit after Morse withdrew. (R. 869.) Knight testified that he brought all letters regarding the pending default to Montgomery's attention and apprised Montgomery that he could "do anything you need to do" on Knight's behalf in the suit. (R. 869.) Montgomery appeared as counsel for Knight at Burt Young's deposition held on October 24, 1989. (R. 869.) Montgomery also appeared at several Rule 30(b)(6) depositions taken in Chicago, Illinois. (R. 869.) However, Montgomery appeared at the bench trial of the garnishment action and stated that he did not represent Knight during the *Buice* proceedings.

Montgomery wrote a demand letter to U.S.F. & G., with copies to Crystal Springs Insurance Agency and Floyd Logan, counsel for Buice, on February 8, 1989. Montgomery also sent follow up letters to U.S.F. & G. on subsequent dates. Morse responded to the February 9 letter by indicating that the identified policy did not cover the Buice claims. (R. 869.) Further letters to Montgomery from Morse clarified U.S.F. & G.'s position that coverage did not exist under the policies for the incident and that U.S.F. & G. had no duty to defend Knight. (R. 869-870.)

On March 28, 1989, the Buice estate, after having filed its amended complaint, filed a motion to strike Knight's answer to the initial complaint and for entry of default judgment against Knight. (R. 870.) Neither Knight nor his attorney, Joe Montgomery, took any action to protect his rights. The Court entered a default judgment in the amount of $1,173,591.00 against Knight on June 18, 1990. (R. 870.) The Magistrate Judge determined that Brock was acting in the scope of his employment at the time of the accident. However, the issue of coverage under the insurance policies was not adjudicated in that opinion.

The Buice estate then instituted a garnishment action

against U.S.F. & G. based on the insurance policies issued to Knight. Knight subsequently brought the present bad faith suit against U.S.F. & G. for alleged wrongful failure to defend in the *Buice* matter. The Knight bad faith action was later consolidated with the *Buice* garnishment action. (R. 166-167.) On or about December 14, 1992, the *Buice* garnishment action was severed from the *Knight* bad faith suit. (R. 626-627.) The garnishment action proceeded to trial before the District Court without a jury on December 14-16, 1992. (R. 829.)

The principle issue in the garnishment lawsuit was whether there was coverage under the U.S.F. & G. business auto policy. The trial court properly narrowed its focus to determine whether Brock's use of the non-owned vehicle was solely for business purposes in connection with Knight's business, sufficient to trigger coverage under the U.S.F. & G. business auto policy. (R. 849.) The Court held, after considering the evidence and testimony of witnesses that Brock was not using the truck solely for business purposes of Knight at the time the accident occurred. (R. 851.) Further, the District Court found that Brock was on a personal mission at the time of the accident, with no connection to his employment. (R. 851.) On April 20, 1994, the District Court entered its bench opinion in the garnishment action releasing U.S.F. & G. from the writ of garnishment after making a finding of no coverage under the business auto policy. (R. 829-851.) The garnishment action is currently on appeal awaiting oral argument in the Fifth Circuit.

On October 12, 1992, U.S.F. & G. filed its motion for summary judgment as to Knight's bad faith claims. (R. 416.) On November 16, 1994, the District Court granted summary judgment to U.S.F. & G. after finding that its actions in withdrawing its defense of Knight were reasonable according to law and did not rise to the level of malice or gross negligence and reckless disregard sufficient to trigger punitive damages. The

Court further held that U.S.F. & G. had an arguable reason to deny the claim at the time it made the decision to withdraw from Knight's defense. (R. 866-89.) On November 29, 1994, the District Court entered judgment dismissing Knight's action against U.S.F. & G. with prejudice. (R. 890-91.)

Knight appealed to the Fifth Circuit, and, on or about September 21, 1995, the Court of Appeals entered its judgment and opinion affirming the District Court's judgment. After Knight filed his petition for rehearing, the Fifth Circuit entered its order denying the petition on November 2, 1995. The present Petition for Writ of Certiorari was filed by Knight on or about January 30, 1996.

REASONS FOR DENYING THE WRIT

I.

THERE ARE NO COMPELLING REASONS FOR THIS COURT TO REVIEW THE FIFTH CIRCUIT'S RULING BASED UPON WELL-SETTLED PRINCIPLES OF MISSISSIPPI INSURANCE LAW

The present controversy between an insured and his insurer is not the type of case worthy of this Court's limited judicial resources. The Fifth Circuit and the District Court both found under well-settled principles of Mississippi insurance law that U.S.F. & G. was entitled to summary judgment on Knight's bad faith claims. Knight's petition should be denied as this Court does "not ordinarily review the holding of a court of appeals on a matter of state law." *Pierson v. Ray*, 386 U.S. 547, 559 n. 12 (1967). Further, this Court will "generally accord great deference to the interpretation and application of state law by the courts of appeals." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 484 n. 13 (1986).

Essentially, Knight maintains the lower court misapplied FED. R. CIV. P. 56 along with Mississippi insurance law to the underlying facts. This Court should decline certiorari jurisdiction as such a writ "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

II.

FIFTH CIRCUIT PROPERLY ANALYZED KNIGHT'S CLAIMS UNDER FED. R. CIV. P. 56

Knight recites familiar passages about Rule 56 and contends that the lower court's granting of summary judgment somehow conflicts with prior rulings of this Court and other Courts of Appeals. Yet Knight fails to cite any factually analogous cases that contradict the lower court's ruling. As for the present cause of action, Knight fails to demonstrate any genuine issue of material fact sufficient to withstand summary judgment. As this Court has held:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

In order to recover punitive damages in a bad faith action, Knight has the burden of proving that U.S.F. & G. "acted with (1) malice, or (2) gross negligence or reckless disregard for the

rights of others." *Hans Const. Co. v. Phoenix Assur. Co.*, 995 F.2d 53, 55 (5th Cir. 1993). "Where there is a legitimate or arguable reason for denial of the claim, the [punitive damages] issue should not be put to the jury." *Lewis v. Equity Nat. Life Ins. Co.*, 637 So. 2d 183, 185 (Miss. 1994). Further, "interpretation and construction of insurance policies is [sic] a matter of law, . . . and therefore, issues involving the duty to defend are particularly amenable to summary judgment." *First Southern Ins. Co v. Jim Lynch Ent. Inc.*, 932 F.2d 717, 719 (8th Cir. 1991).

The Fifth Circuit correctly affirmed the District Court's ruling that U.S.F. & G. had an arguable reason for denying coverage and a defense to Knight in the *Buice* action. Implicit within the Fifth Circuit's ruling was the District Court's previous determination in the garnishment action that there was no coverage for the Brock/Buice accident under the business auto policy's non-owned vehicle endorsement. More importantly, Knight was unable to show any evidence that U.S.F. & G. acted with malice or gross negligence or reckless disregard in denying coverage and a defense to Knight for the *Buice* action. Thus, Rule 56 mandates summary judgment on the punitive damages claim "because the non-moving party has failed to make a sufficient showing on an essential element of h[is] case with respect to which [h]e has the burden of proof." *Celotex*, 477 U.S. at 323.

III.

IN THE ABSENCE OF COVERAGE, U.S.F. & G. HAD NO DUTY TO DEFEND

In the absence of coverage, U.S.F. & G. had no duty to defend. In Part IV of the Relevant Business Auto Policy, No. 041146688, issued to Knight during the time of the accident, the language plainly states:

> We have the right and duty to defend any suit asking for these damages. However, we have no duty to defend suits for bodily injury or property damage not covered by this policy.

(R. 557.)

Regarding coverage, the business auto policy issued by U.S.F. & G. contained a non-owned vehicle endorsement, JXN154-B which provided as follows:

> It is agreed that the unqualified word "insured" wherever used in Part IV - Liability Insurance includes only you and any organization legally responsible for the use of your automobile, provided the actual use of the automobile is by you or with your permission.
>
> Exceptions: The foregoing limitation does not apply with respect to private passenger automobiles or to operation of other automobiles while being used *solely for business purposes in connection with your business*. (Emphasis added.)

(R. 874.) Thus, U.S.F. & G. was contractually obligated to provide a defense for suits involving bodily injury or property damage that occurred through a non-owned vehicle, under the restrictive non-owned vehicle endorsement JXN154-B only if the non-owned vehicle was being used "solely for business purposes" in connection with Knight's business at the time of the accident. As stated before, the District Court specifically found in the garnishment action that there was no coverage for the Buice accident under the applicable business auto policy.

Knight has devoted much argument in his Petition regarding the extent of an insurer's duty to defend and the consequences of an alleged improper withdrawal of such defense (breach). However, a breach of duty to defend can occur only if there was a duty to defend in the first place. *Jones v. Southern Marine & Aviation Underwriters*, 888 F.2d 358, 362 (5th Cir. 1989). Although the duty to defend arises when a potential for coverage exists (*see Merchants Co. v. American Motorists Ins.*, 794 F. Supp. 611 (S.D. Miss. 1992)), the Fifth Circuit has held that:

> Nevertheless, this duty is not limitless: although the outer boundary of a policy's potential coverage may be expansive, an insurer's duty to defend ceases there.

Snug Harbor, Ltd. v. Zurich Ins., 968 F.2d 538, 545 (5th Cir. 1992). *See also, New Hampshire Ins. Co. v. Vardaman*, 838 F. Supp. 1132 (N.D. Miss. 1993) (insurer had no legal obligation to defend or indemnify insured under homeowner's policy where evidence showed that facts fell within policy exclusions from coverage).

In the absence of coverage for a particular claim, there can be no duty to defend said claim. Both the Fifth Circuit and the District Court found that at the time U.S.F. & G. attorney Stanford Morse withdrew as counsel for Knight there was no indication that the vehicle driven by Brock was covered under any of the U.S.F. & G. policies. The lower courts correctly held that since there was no coverage for the Brock/Buice accident, there was no duty upon U.S.F. & G. to defend Knight in the wrongful death action arising out of said accident.

IV.

KNIGHT SUFFERED NO PREJUDICE AS A RESULT OF U.S.F. & G.'S ACTIONS

Knight claims that the assumption of a defense by U.S.F. & G. prejudiced him following Stanford Morse's withdrawal. Knight contends that as a result of such prejudice, U.S.F. & G. was later estopped to assert any policy provision which would decline coverage or the obligation to defend. However, the estoppel and prejudice arguments were addressed by the District Court in its opinion following the garnishment action:

> An insurer may conduct the defense of a lawsuit against an insured until such time as the insurer discovers non-coverage. *Insurance*, 44 AM. JUR. 2d § 1423, p. 371. An insurer may be estopped from denying liability under a policy if the insurer's conduct results in prejudice to the insured. *Id.*, § 1428, p. 376. In this case, Knight was informed well in advance of the entry of the default judgment that U.S.F. & G. was withdrawing from his defense, as the company determined that there was no coverage for the incident in any of the policies in force at the time of the accident. In fact, Knight obtained the assistance of another attorney after Morse told Knight tnat U.S.F. & G. was withdrawing from the defense of the lawsuit. The unopposed default judgment was entered without testimony.
>
> If an insurer suspects non-liability due to lack

> of policy coverage, and plans to defend on an issue of non-coverage, it may be construed a breach of duty for the insurer to continue to represent the insured. *See Martin v. Travelers Indemnity Co.*, 450 F.2d 542 (5th Cir. 1971). In the instant case, the insurer began representation of the insured until U.S.F. & G. was able to determine that the policies did not afford coverage for the incident. At that time, Morse notified Knight that he would have to retain other counsel. Knight testified that he consulted with Montgomery as soon as Morse indicated that U.S.F. & G. would not continue a defense on Knight's behalf. Knight stated that he told Montgomery to do "whatever was necessary" to assist his defense. Indeed, Montgomery wrote several demand letters to U.S.F. & G. for Knight and appeared at depositions as his attorney. The Court cannot consider that U.S.F. & G.'s actions prejudiced Knight as the insurer continued to deny coverage and took no steps in furtherance or opposition to Knight's defense after their denial.

(R. 847-48.) The above discussion of U.S.F. & G.'s actions by the District Court clearly demonstrates an absence of prejudice towards Knight, especially since Knight was assisted by attorney Joe Montgomery prior to the entry of the default judgment.

Knight claims that U.S.F. & G. failed to conduct an adequate investigation before Morse withdrew from Knight's defense. This assertion may be easily disposed of as "the mere fact that an investigation of a claim is deficient or incompetent is not sufficient to establish malice, gross negligence or reckless

disregard of the rights of the insured." *Guy v. Commonwealth Life Ins. Co.*, 894 F.2d 1407, 1413 (5th Cir. 1990).

Knight maintains he was prejudiced because attorney Stanford Morse allegedly had a conflict of interest in representing Knight while being made aware of coverage issues by U.S.F. & G. during his representation of Knight. Both courts below found no merit to this claim of prejudice by Knight. In addition, Knight claims that the alleged conflict of interest should estop U.S.F. & G. from asserting a denial of coverage. However, it is well settled that "theories of waiver and estoppel cannot be used to extend policy coverage to subject matter outside of the coverage provided under the clear terms of the policy." *Employers Reinsurance v. Martin, Gordon & Jones*, 767 F. Supp. 1355, 1363 (S.D. Miss. 1991).

V.

ARGUABLE REASON PRECLUDES PUNITIVE DAMAGES

As the Mississippi Supreme Court has recently held, "[i]n insurance contract cases, '[t]he trial court is responsible for reviewing all evidence before it in order to ascertain whether the jury should be permitted to decide the issue of punitive damages.' " *Lewis*, 637 So. 2d at 185. In deciding whether an insurer had an arguable basis to deny insurance liability, Mississippi courts usually apply the directed verdict test. *Dunn v. State Farm Fire & Casualty Co.*, 927 F.2d 869 (5th Cir. 1991). "Under this test, unless the insured would be entitled to a directed verdict on the underlying insurance claim, an arguable reason to deny an insurance claim exists in most instances." *Dunn*, 927 at 873. As Brock was not using his personal vehicle solely for the business purposes of Knight on the night of the accident, the lower courts correctly granted and affirmed summary judgment

as no directed verdict could be granted to Knight on the coverage claim. The Fifth Circuit properly held that it was reasonable for U.S.F. & G. to conclude that there was no coverage under the business auto policy for the Buice accident. "Lack of coverage under the policy is a legitimate or arguable reason for denial of a claim." *Nationwide Mutual Fire Ins. Co. v. Dungan*, 634 F. Supp. 674, 684, n. 7, (S.D. Miss. 1986). Moreover, the District Court in the garnishment action specifically found there was no coverage for the Buice accident.

U.S.F. & G. had an arguable reason in declining coverage and refusing to provide a defense, thus, the Fifth Circuit properly held that the punitive damages claim should be dismissed. The arguable reason was simply that the truck owned and driven by Gary Brock at the time of the Buice accident was not being used "solely for the business purposes" of Steve Knight, Jr., so as to fall within the coverage of the non-owned vehicle endorsement to the business auto policy.

Contrary to Knight's representations, the District Court and the Fifth Circuit did not radically depart from the applicable substantive Mississippi insurance law in the context of FED. R. CIV. P. 56. The instant case is not deserving of this Court's precious time and resources. The lower courts' rulings do not conflict with rulings of other circuit courts, call into question the constitutionality of any statute, nor have they resulted in a radical departure from the accepted and usual course of judicial proceedings so as to require an exercise of this Court's supervisory power.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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